FEDERALLY SPEAKING

by Barry J. Lipson

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Welcome to **Federally Speaking,** brought to you by the Western Pennsylvania Chapter of the Federal Bar Association. Our purpose in bringing you **Federally Speaking** is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation that may impact your practice, or "heads ups" to Federal CLE opportunities. Our threefold objective is to educate, to provoke thought and to entertain. This is our 25th column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm.

IS YOUR SUPREME COURT LAW OUTDATED?

Then Join us march 12, 2003 at the Pittsburgh Federal Courthouse for a comprehensive U.S. Supreme Court 5-hour CLE Update for all practitioners, 9am-4pm, featuring U.S. Supreme Court Clerk William Suter, U.S. Court of Appeals Judge D. Brooks Smith, U.S. Attorney Mary Beth Buchanan, ACLU Legal Director Witold (Vic) Walczak, Duquesne Law Professor and Program Chair Ken Gormley, Pitt Law Professor John Parry, Columnist Barry J. Lipson, and Supreme Court practitioners Harry Litman and Thomas McGough. This major jurisprudential event is presented by the Federal Bar Association, Western Pennsylvania Chapter, in conjunction with Duquesne Law School. You will view General Suter conducting the historically significant first-ever Western Pennsylvania-based U.S. Supreme Court Swearing-In Ceremony. The five-hour CLE seminar, including one-hour ethics, will provide to new and experienced practitioners their annual update of significant Constitutional decisions, criminal, civil and civil rights; examination of the Court's 2003 docket; nuts and bolts of Supreme Court practice; and insights into the effects and aftermaths of 9/11 and into changes in the composition of the Court. Ethical consideration explored will include the Court's positions on criticisms of Judges and Judicial Proceedings; on unpublished opinions, their use and biases; and on ethnic and racial criteria. The relationships between the Pennsylvania and U.S. Supreme Courts will be reviewed. Cost: $140.00 ($125.00 for FBA members and Duquesne Law Alumni). Catered luncheon included. Immediate reservations recommended, as space is limited to size of Ceremonial Federal Courtroom. Send reservations and payment to Susan Santiago, Springer Bush & Perry, Fifteenth Floor, Two Gateway Center, Pittsburgh, PA 15222 (412/281-4900).

LIBERTY'S CORNER

TRADING SAFETY FOR LIBERTY. ***The Federal Lawyer*** for January 2003, in its cover story "Constitutional Issues After 9/11: Trading Liberty for Safety," by Michael Linz and Sarah Meltzer, sums up many governmental actions that have previously been reported in ***Federally Speaking's "Liberty's Corner,"*** and which they refer to as having "needlessly placed in jeopardy fundamental liberties that are embodied in the Constitution," including the **USA PATRIOT Act** ("an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'"),

Military Tribunals, Denial of Counsel, Secret Imprisonments without Charges, Governmental Spying, the Creppy Directive, the Palmer-style Ashcroft Raids, etc. They conclude that history "***shall judge***" whether those "who would dare question its [the **Administration's**] judgments … 'only aid terrorists'" by, as Attorney General Ashcroft cautioned **Congress**, scaring "peace-loving people with phantoms of lost liberty;" or "if the government's actions … like the Palmer Raids and the internment of America's Japanese citizens, [constitute] reprehensible conduct unbefitting our great nation."

Fed-pourri™

TOOT TOOT TOOTSIES – THANK YOU! Nobody likes tattletales, and whistleblowers (toot toot) are tattletales, correct? If you're the "tattlee," I guess that's right! Even President Bush, while heralding the **Sarbanes-Oxley Act of 2002**, as "a new ethic of corporate responsibility" (see ***Federally Speaking,*** No. 21), appears to have wanted to interpret very narrowly its provision prohibiting "retaliating against corporate whistleblowers," by trying to deny its protection to whistles blown in the ear of "***any*** Members of Congress" (18 USC §1514A)**,** as has **U.S. Labor Department** Solicitor Eugene Scalia, son of Justice Scalia. Needless to say, whistleblowing has been the quickest way to work one's way down through an organization, and out. Enter ***Time Magazine*** and its selection of three "toot toot tootsies," three whistle-packing mamas, as "Persons of the Year" for blowing the whistle on two now disgraced corporations, Enron and WorldCom, and on the **FBI**. Enron VP Sherron Watkins wrote to Chairman Lay "warning him that the company's methods of accounting were improper;" FBI staff attorney Coleen Rowley sent FBI Director Mueller a memo "about how the bureau brushed off pleas from her Minneapolis, Minn., field office that Zacarias Moussaoui, who is now indicted as a Sept. 11 co-conspirator, was a man who must be investigated;" and Cynthia Cooper informed the WorldCom "board that the company had covered up $3.8 billion in losses through the prestidigitations of phony bookkeeping." True, these were all internal disclosures, but when word got out the proverbial waste product hit the proverbial air moving equipment … . Now all we need are some real "bell-ringers" to herald in needed solutions.

TO MEET OR NOT TO MEET … Mr. Shogo Ando, of Japan, and Mr. Manfred A. Mueller, of Germany, came from two different worlds and probably led very different lives. Normally, their paths would never have crossed. But, Mr. Ando as former president of Nippon Electrode Company Ltd. (NDK), and Mr. Mueller as a former executive of VAW Carbon GmbH (VAW), had one thing in common, carbon cathode block, which because of its reputed superior conductivity properties, is commonly used in aluminum smelters and pots for the production of primary aluminum manufactured in the United States and elsewhere. Previously NDK, VAW and Anchor Industrial Products Inc. (formerly Hepworth) had been separately charged with "conspiring with others to suppress and eliminate competition in the carbon cathode block industry," to which they each pleaded guilty and were sentenced to pay fines totaling in excess of $2 million for their roles in this conspiracy. But the **Antitrust Division of the U.S. Justice Department (DOJ)** would not stop here. Acknowledging that fictitious entities cannot actually conspire, and that it takes real people to tango, they gathered the evidence and determined that the following had transpired. Ando and Mueller had participated "in meetings and conversations in Asia and Europe to discuss the prices of carbon cathode block sold in the U.S. and elsewhere," they then agreed "during those meetings and conversations, to charge prices at certain levels and otherwise to increase and maintain prices of carbon cathode block sold in the U.S. and elsewhere," and then they exchanged "sales and customer information for the purpose of monitoring and enforcing adherence to the terms of the agreements reached." These "tangoists" were, therefore, charged with violating **Section One of the Sherman Act** (15 U.S.C. § 1), which carries a maximum penalty of three years imprisonment and a $350,000 fine for individuals (which may be increased to twice the gain derived from the crime or twice the loss suffered by

the victims of the crime, if either of these amounts is greater than the statutory maximum fine). A **Federal grand jury** in Camden, New Jersey agreed that the **DOJ** had shown probable cause and indicted them for their alleged roles in this "international conspiracy to fix the price of carbon cathode block." Charles A. James, Assistant Attorney General in charge of the **Antitrust Division**, advised that the "**Antitrust Division** will continue to pursue violations of the Antitrust laws that harm American consumers and businesses." Perchance their future meetings maybe in **Federal prison**.

EYES NORTH! ***Federally Speaking***, we must keep a constant lookout beyond our borders. The **Canadian Competition Bureau's** Annual Report is helpful in this regard. For example, it confirms that as "a result of the increasing integration of the world economy and the globalization of commerce, international cartels are growing both in number and complexity," that accordingly the Bureau is "working more and more with agencies from other jurisdictions in its investigations of transnational anti-competitive conduct," and that the Canadians are currently "investigating 18 international cartels." Moreover, on "April 24, 2001, the Bureau, along with competition agencies from 12 countries, participated in the launch of a Web site that allows consumers to file complaints on the Internet about e-commerce transactions with foreign companies," which has grown to 17, and now includes the **Australian Competition and Consumer Commission, the Belgian Federal Administration for Economic Inspections, the Canadian Competition Bureau, the Danish Consumer Ombudsman, the Finnish Consumer Ombudsman, the Hungarian General Inspectorate for Consumer Protection, the Japanese Cabinet Office, NCAC, METI, JFTC, the Korea Consumer Protection Board, the Latvian Consumer Rights Protection Centre, the Mexican Procuraduria Federal del Consumidor, the New Zealand Ministry of Consumer Affairs, the Norwegian Consumer Ombudsman, the Polish Office for Competition & Consumer Protection, the Swedish Consumer Ombudsman, the Swiss State Secretariat for Economic Affairs, the United Kingdom Office of Fair Trading, and the U.S Federal Trade Commission,** as well as the **Organization for Economic Cooperation and Development** (go to: http://www.econsumer.gov/). Then, too, the "**Act to Amend the Competition Act and the Competition Tribunal Act**, S.C. 2002, c. 16," which came into force on June 21, 2002, now permits private causes of action before the **Competition Tribunal** in the areas of "refusal to deal, tied selling, exclusive dealing and market restrictions (sections 75 and 77 of the **Competition Act**);" gives the **Competition Tribunal** "the authority to issue interim orders prior to litigation to prevent irreparable harm to a business. … except mergers and specialization agreements;" and "enables the **Competition Bureau** to request formal assistance from foreign states to obtain and transmit evidence located abroad in non-criminal competition matters such as abuse of dominance" and "establishes a framework that sets out the basic requirements to be incorporated in any mutual legal assistance agreement negotiated for this purpose." The **Competition Bureau** has been receiving "about eight immunity requests each year" in international matters, to "grant individuals immunity from prosecution for criminal offences in exchange for assistance in investigating those offences." Also, eyes east, west and south!

FOLLOW-UP

UNPUBLISHED RULE 32.1. It has been predicted that the unpublished opinion dilemma (***The Publication Dilemma***, ***Federally Speaking*,** No. 21) could be solved with the adoption by the U.S. Supreme Court in April 2005 of the yet unfinalized and unpublished Uniform Rule 32.1 (ABAJournal eReport, 12/13/02). Since 1964, when the **Judicial Conference of the United States,** apparently in light of the proliferation of judicial opinions, resolved that "the judges of the **courts of appeals** and the **district courts** authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct," fewer and fewer decisions have been published. Moreover, six out of the thirteen Federal Circuits "do not even allow citation to such unpublished opinions 'except to support a claim of res judicata, collateral estoppel or law of the case'." It has been reported that one survey of such opinions found that not only did the unpublished opinions "included a surprising number of reversals,

dissents, and concurrences," but "we discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases" (Merritt and Brudney, 54 Vand. L. Rev. 71, 119 (2001)).

CORPORATE COUNSELS HEADS UP! From years of corporate counseling it has been a "rule of thumb" that if you want the **Government** to bring a case they won't, and if you don't want the case brought they will! During my **Food, Dug and Cosmetic** days, I vividly remember amassing a case full of vivid "passing off" examples, by a major interstate supermarket chain, of private label groceries with label designs and coloring virtually identical to the brand name products (including those of my client), and shipping this case with a detailed analysis to the **FTC**. The **FTC**, of course, kept the case of groceries, while rejecting the legal case. But times may be a changing! In ***U.S. v. ElcomSoft and Dmitry Sklyarov*** (NDCA, CR-01-20138RMW), discussed in "***Digital Wars And Fair Use,***" ***Federally Speaking,*** No.23, as stated therein, "Adobe, the producer of the subject 'e-books' … handed the **FBI** the case on a 'cyber-platter'." According to the affidavit in this **Federal Criminal Prosecution** of **FBI** Special Agent Daniel J. O'Connell, assigned to the **FBI's High Tech Squad** at San Jose, California, "Adobe purchased a copy of the ElcomSoft unlocking software over the Internet … Thereafter, ElcomSoft … electronically sent the unlocking key registration code from ElcomSoft [in Russia] to the purchaser (Adobe) in San Jose, California … A review [by Adobe] of the opening screen on the ElcomSoft software purchased showed that a person named Dmitry Sklyarov is identified as being the copyright holder" of this AEBPR unlocking software. "Adobe learned that Dmitry Sklyarov is slated to speak on July 15, 1001 [sic: 2001] at a conference entitled Defcon-9 at Las Vegas Nevada" and advised me that "Sklyarov is scheduled to make a presentation related to the AEBPR software program" there. The **Government** arrested and indicted Sklyarov when he visited the U.S. for this conference. From Adobe's viewpoint, a great result. Adobe was able to drop its civil lawsuit and let the **Government** proceed criminally in its stead. (For another viewpoint, see **Digital Wars, supra.)** Thus, the bottom line of this "Heads Up" for plaintiff counseling is "it may be worth a shot to seek **Fed** involvement, if available it could be cheaper, harsher and more effective." However, the "Heads Up" bottom line for defense counseling is more ominous: "**Fed** bullets may be a flying, keep you bottoms low and heads down!"

CERTIFICATE OF APPRECIATION. In addition to our "Accolades To Judge Lee" (***Federally Speaking***, No. 21), we give a "Certificate of Appreciation" to District Judge Robert J. Cindrich of the U.S. District Court for the Western District of Pennsylvania, for his presenting of "Certificates of Appreciation" to those completing jury duty "in recognition of her good citizenship and the personal sacrifice made by her to serve her country as a juror," and reminding them that: "Too many people take for granted the great blessings our democracy has bestowed upon us and our children. It is clear to me that you are aware that a democracy is not self-effectuating and that it demands the ongoing, active participation of the citizenry if it is to endure."

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